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# Convention on the Elimination of All Forms of Discrimination against Women

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**Committee on the Elimination of Discrimination against Women**
**Fifty-seventh session**
10-28 February 2014

## Communication No. 36/2012

### Views adopted by the Committee at its fifty-seventh session, 10-28 February 2014

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| *Submitted by*: | Elisabeth de Blok et al. (represented by counsel, Marlies S. A. Vegter) |
| *Alleged victims*: | The authors |
| *State party*: | The Netherlands |
| *Date of communication*: | 24 November 2011 (initial submission) |
| *References*: | Transmitted to the State party on 13 January 2012 (not issued in document form) |
| *Date of adoption of decision*: | 17 February 2014 |

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## Annex

# Views of the Committee on the Elimination of Discrimination against Women under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (fifty-seventh session)

## Communication No. 36/2012, *Elisabeth de Blok et al. v. the Netherlands**

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|---|---|
| *Submitted by*: | Elisabeth de Blok et al. (represented by counsel, Marlies S. A. Vegter) |
| *Alleged victims*: | The authors |
| *State party*: | The Netherlands |
| *Date of communication*: | 24 November 2011 (initial submission) |
| *References*: | Transmitted to the State party on 13 January 2012 (not issued in document form) |

*The Committee on the Elimination of Discrimination against Women*, established under article 17 of the Convention on the Elimination of All Forms of Discrimination against Women,

*Meeting on* 17 February 2014,

*Adopts* the following:

## Views under article 7 (3) of the Optional Protocol

1. The authors of the communication are six nationals of the Netherlands: Bettina Gerarda Elisabeth de Blok (born in 1972), Jolanda Huntelaar (born in 1974), Titia Helena Spreij (born in 1969), Jacqueline Antoinette Andrews (born in 1971), Henriette Sophie Lesia Koers (born in 1975) and Maria Johanna Hendrika den Balvert (born in 1970). They claim to be victims of a violation by the Netherlands of their rights under article 11 (2)(b) of the Convention on the Elimination of All Forms of Discrimination against Women. They are represented by counsel, Marlies S. A. Vegter of Bosch Advocaten. The Convention and the Optional Protocol thereto entered into force for the Netherlands on 22 August 1991 and 22 August 2002, respectively.

### Facts as submitted by the authors

*Preliminary remarks regarding the general context, as submitted by the authors*

2.1 On 1 January 1998, the Incapacity Insurance (Self-employed Persons) Act entered into force, establishing public mandatory insurance for self-employed

* The following members of the Committee participated in the examination of the present communication: Ayse Feride Acar, Olinda Bareiro-Bobadilla, Niklas Bruun, Náela Gabr Hilary Gbedemah, Nahla Haidar, Yoko Hayashi, Ismat Jahan, Dalia Leinarte Violeta Neubauer, Theodora Nwankwo, Pramila Patten, Silvia Pimentel, Maria Helena Pires Biancamaria Pomeranzi, Patricia Schulz and Xiaoqiao Zou.

workers, professional workers and co-working spouses against the risk of loss of income owing to inability to work. Those insured paid premiums for coverage.

2.2 Under article 22 (2) of the Act, insured women were entitled to a maternity allowance for at least 16 weeks around the date of delivery, for which they paid no additional premium. The allowance was 100 per cent of the applicable basis for determining the allowance, but did not exceed the statutory minimum wage (art. 24, read in conjunction with art. 8 of the Act). The applicable basis for calculating the allowance depended on the income earned by those insured during a period (laid down in the Act) preceding delivery.

2.3 On 1 December 2001, the Work and Care Act entered into force. It incorporated different statutory leave arrangements regarding the labour and care combination. The arrangement on maternity allowances for self-employed women (including professional workers and co-working spouses) became part of the Act under article 3 (19). The funding of the arrangement remained unchanged.

2.4 On 1 August 2004, the public mandatory incapacity insurance for self-employed workers, professional workers and co-working spouses ceased to exist following the entry into force of the Discontinuation of Access to Incapacity Insurance (Self-employed Persons) Act. Consequently, self-employed women (including professional workers and co-working spouses) were no longer entitled to receive public maternity benefits and self-employed workers would have to take out private insurance if they wished to be covered against loss of income.

2.5 With the change in the law of 1 August 2004, self-employed women had no choice but to turn to private insurance companies to cover the loss of income resulting from pregnancy and delivery. Private insurers covered the risk in a number of cases. For self-employed women, however, such insurance came with restrictions. Nearly all policy conditions contained a clause to the effect that the right to maternity allowance could be exercised only if the anticipated date of delivery was at least two years after the start date of the insurance.

2.6 In its explanatory memorandum to the parliament of the Netherlands regarding the draft Discontinuation of Access to Incapacity Insurance (Self-employed Persons) Act, the Government said the following on the maternity allowance for self-employed women:

> The Government has asked itself whether these benefits must be the subject of a public law arrangement. International treaties do not give an obligation to do so. Privatization of this insurance is in line with the privatization of the insurance for self-employed workers regarding loss of income owing to incapacity. As a result, the burden is carried by the self-employed workers themselves, as is the case with the burden of incapacity for work. Self-employed workers can assess the risk themselves and, if they want to, provide for it (reservation). Furthermore, there are insurers who insure against the risk of pregnancy and delivery — as a supplement to the benefits resulting from the Work and Care Act — under certain conditions as part of the incapacity insurance.

2.7 It went on to say that, "following the above, the Government does not see any reason why it should retain a public law arrangement for a maternity allowance for self-employed workers". According to the Government, "this means that, from the date on which the Incapacity Insurance (Self-e nployed Persons) Act insurance is

terminated, no new maternity allowance will be supplied". It also said that "pregnancy during the first two years after taking out the insurance is usually not covered".[1]

2.8 When the Discontinuation of Access to Incapacity Insurance (Self-employed Persons) Act became effective, taking out insurance against the risk of pregnancy and delivery with a private insurer was not an option for the authors because of the two-year qualifying period; they would receive no benefits during that period. The cost of private incapacity insurance, including maternity allowance, was substantially higher than that paid by self-employed women under the Incapacity Insurance (Self-employed Persons) Act.

2.9 Women other than the authors have taken legal action against insurers with regard to the restrictive conditions imposed in connection with the risk of pregnancy and delivery, arguing that insurers are not entitled to apply conditions, such as a two-year qualifying period, because doing so violates the prohibition against gender-based discrimination. The argument has been rejected by the State party's courts. The Supreme Court considered that it was up to insurance companies to offer insurance coverage for incapacity that was the same for men and women and that the same insurance might also provide coverage for loss of income resulting from pregnancy.[2] It was of the view that a margin of appreciation included the possibility to set out deviating conditions in the policy. The authors submit that the ruling leaves no doubt as to the need for a public insurance for self-employed women, given that private insurance policies (if available at all) do not provide an adequate alternative.

2.10 The termination of the public insurance and its consequences for the maternity allowance for self-employed women created strong commotion in the State party and, consequently, the Act on Benefits in respect of Pregnancies and Delivery for Self-Employed Persons became effective on 4 June 2008. Since then, the Work and Care Act has provided for a right to maternity allowance for self-employed women during a period of at least 16 weeks. Pursuant to article 6 of the relevant transitional provisions, however, self-employed women who gave birth before 4 June 2008 cannot claim benefits under this new legislation, meaning that the Act has no retroactive effect.

2.11 Before the start of the legal proceedings, the authors applied to their union, which is a member of the Netherlands Trade Union Confederation. The Confederation and other organizations received numerous complaints from self-employed women who were unable to take out insurance against the risk of loss of income during the period surrounding pregnancy with a private insurer when the public insurance was cancelled. The authors state that this issue therefore affects not only them but also many other women in the Netherlands.

*Authors' specific situation*

2.12 All the authors were self-employed after August 2004 and gave birth between June 2005 and March 2006. As a result of the entry into force of the Discontinuation of Access to Incapacity Insurance (Self-employed Persons) Act on 1 August 2004,

[1] Informal translation provided by the authors.

[2] Supreme Court of the Netherlands, 11 July 2008, LJN BD1850, NJ 2008.

they did not receive social security benefits during the period around the delivery of their children when they were unable to work.

2.13 On 7 May 2004, Ms. De Blok took out private incapacity insurance that provided for maternity allowance. The insurers, however, refused to make any payment to her because her maternity leave was before the end of the two-year qualifying period laid down in the insurance contract. Eventually, she received compensation of EUR 1,818.76 from her insurer (being the allowance to which she would have been entitled had there been no qualifying period, less the deductible of two months) because she threatened to take the matter to court.

2.14 Ms. Huntelaar and Ms. Spreij inquired as to the cost of private incapacity insurance after media reports regarding the Discontinuation of Access to Incapacity Insurance (Self-employed Persons) Act. The premiums proved to be too high for them to afford it. The monthly insurance premium for Ms. Huntelaar was so high that it nearly equalled her income. Furthermore, she did not wish to take out private insurance against a premium that she could not afford, given that she did not wish to wait until after the qualifying period had passed to have a second child considering the date of birth of her first child. At the time, she sought quotes from at least five private insurers, but all applied a two-year qualifying period.

2.15 Ms. Andrews, Ms. Koers and Ms. Den Balvert also did not take out private incapacity insurance in the light of the amount of the premium and the qualifying period.

2.16 On 12 December 2005, the authors sought a declaratory decision by the District Court of The Hague (first-instance court), claiming that the State had violated, among others, article 11 (2)(b) of the Convention through its failure to provide a statutory arrangement entitling self-employed women to maternity allowance. They argued that the wording of the article showed that the State had a clear and specific obligation to achieve a narrowly defined result, which was to give all women carrying out paid work the right to maternity leave with compensation for their loss of income. Article 11 (2)(b) of the Convention lays down an obligation to achieve a specific result. They further argued that the State party had failed to comply with the principle that pregnant women must be protected against health risks and loss of income. Their case, therefore, was one of direct gender-based discrimination as a result of which the authors had suffered damage for which they were claiming compensation from the State and the payment of an advance of the compensation.

2.17 On 25 July 2007, the District Court of The Hague rejected the authors' claim, stating that article 11 (2)(b) of the Convention was not directly applicable because it contained merely "an instruction" for States parties to introduce maternity leave, leaving them the freedom to determine how specifically to achieve this. The article therefore did not have direct effect and could not form the basis of the authors' claim against the State.

2.18 On 21 July 2009, the Court of Appeal of The Hague upheld the ruling of the District Court. It found that article 11 (2)(b) of the Convention was too general to be applied in a court of law, given that the article required the State only to take appropriate measures and did not prescribe the exact measures to be taken. The Court established that the duration of the maternity leave, its form and the amount of the benefit had not been specified and that it was therefore unable to apply the

article. On 1 April 2010, the Supreme Court upheld the ruling of the Court of Appeal.

**Complaint**

3.1 The authors claim that their rights under article 11 (2)(b) of the Convention have been violated because the State party took no measures, regarding the period from 1 August 2004 to 4 June 2008, to provide for maternity leave with compensation for loss of income for self-employed women during the period from 1 August 2004 to 4 June 2008. They request the Committee to recommend that the State party compensate them for the disadvantage that they suffered and that it take appropriate measures that meet the requirements of article 11 (2)(b) of the Convention.

3.2 During the period from 1 August 2004 to 4 June 2008, spanning the abolishment and reintroduction of the maternity allowance, damage was caused to the authors because they received no benefits while on maternity leave. Taking out private insurance was not an option[3] because the premiums were prohibitive and their respective maternity leaves were before the expiry of the qualifying period applied by the insurers. The damage suffered by the authors is equal to the amount that they would have received had the Incapacity Insurance (Self-employed Persons) Act not been repealed with effect from 1 August 2004. They provide a detailed calculation of the damage incurred by each of them.[4]

3.3 The authors refer to paragraph 10.2 of the Committee's views in communication No. 3/2004, *Nguyen v. the Netherlands*,[5] and argue that an arrangement providing for maternity leave with pay or with comparable social benefits for all women who perform paid work must comply with the obligations of article 11(2) (b) of the Convention. They also argue that it is the State party's duty to achieve that result and to do so in such a way as to create enforceable rights for women. The State party's margin of appreciation is, therefore, to determine what an appropriate allowance is and also to create different systems for women who are self-employed workers and for salaried workers. However, determining that no allowance is appropriate falls outside the scope of the State party's margin of appreciation.

3.4 The authors submit that the matter of paid maternity leave was addressed in the fourth and fifth periodic reports of the Netherlands to the Committee. In 2007, in its concluding observations on the fourth periodic report, the Committee took the following position regarding the situation of self-employed women: "[The Committee] is further concerned about the ... repeal of the Invalidity Insurance (Self-Employed Persons) Act in 2004, which resulted in the termination of maternity allowance for independent entrepreneurs ... The Committee calls upon the State

[3] In fact, as explained by the authors, Ms. De Blok did take out private insurance.

[4] The authors claim the following amounts: Ms. Andrews, EUR 2,080.08; Ms. Den Balvert,EUR 4,086.60; Ms. De Blok, EUR 3,003.27 (but in fact she claimed only EUR 1,184.51 because she had received EUR 1,818.76 from her insurer); Ms. Huntelaar, EUR 1,756.73; Ms. Koers, EUR 4,021.23; and Ms Spreij, EUR 2,213.08.

[5] See *Dung Thi Thuy Nguyen v. the Netherlands*, communication No. 3/2004, views adopted on 14 August 2006 (CEDAW/C/36/D/3/2004).

party to ... reinstate maternity benefits for all women in line with article 11 (2)(b) of the Convention".[6]

3.5 The authors note that, prior to the examination of the State party's fifth periodic report, the Committee requested the State party to provide written replies to the list of issues, which included the following: "The Committee, in its previous concluding observations (CEDAW/C/NDL/CO/4, para. 30), called upon the State party to reinstate maternity benefits for all women, including the self-employed and entrepreneurs. This was done in July 2008 after the entry into force of the Work and Care Act. In this regard, please indicate whether the Government has considered introducing a compensation arrangement for those self-employed women who were pregnant in the period between the revocation of the Invalidity Insurance Act in 2004 and July 2008."[7]

3.6 These considerations lead the authors to the conclusion that, in the Committee's view, article 11 (2)(b) of the Convention makes a clear and unambiguous provision that all women who perform paid work are entitled to a period of paid leave and that this right also existed for self-employed women during the period from August 2004 to July 2008. The authors, however, have been denied this right and the State party must therefore compensate them for the loss of income that they suffered.

3.7 The State party's response to the request of the Committee referred to in paragraph 3.5 was, however, as follows:

> The Dutch Government does not consider that the reinstatement of maternity benefits for self-employed women should be a ground for introducing a compensation arrangement for these women who were not entitled to a benefit in the intervening period. As it would be retroactive, such an arrangement would not enable the women concerned to stop working or to work less during the pre-natal or post-natal periods, which is the sole purpose of maternity benefit. An appeal court ruling on this subject is expected in October 2009.[8]

3.8 The authors conclude that the State party is unwilling to recognize its obligations under article 11 (2)(b) of the Convention and that it continuously argues in domestic proceedings that this provision has no direct effect and that the authors cannot derive any right from it. The Supreme Court has rejected the authors' claim against the State party.

**State party's observations on admissibility and merits**

4.1 On 12 July 2012, the State party submitted its observations on the admissibility and the merits of the communication. Preliminarily, the State party takes note that the issue before the Committee is whether article 11 (2)(b) has been violated in the present case.

4.2 It recalls that all the authors are self-employed and that they gave birth between 2005 and 2006. Until 31 July 2004, self-employed persons were compulsorily insured against the risk of loss of income as a result of incapacity for work under the Incapacity Insurance (Self-employed Persons) Act. Under the Work

[6] CEDAW/C/NLD/CO/4, paras. 29-30.
[7] CEDAW/C/NLD/Q/5, para. 19.
[8] CEDAW/C/NLD/Q/5/Add.1.

and Care Act, self-employed women were also entitled to a State maternity benefit, up to the value of the statutory minimum wage, for at least 16 weeks. The benefit was funded through contributions under the Incapacity Insurance (Self-employed Persons) Act. The Discontinuation of Access to Incapacity Insurance (Self-employed Persons) Act entered into force on 1 August 2004, ending the entitlement of self-employed women to maternity benefits. Thereafter, they could join a private insurance scheme; one author did so, the others did not.

4.3 The authors complained to the District Court of The Hague, claiming that the State should have ensured an adequate maternity benefit scheme in keeping with, among others, its obligations under the Convention. The District Court declared their claim unfounded. The Court of Appeal of The Hague upheld the judgement. The Supreme Court examined the appeal in cassation and dismissed it, ruling that the provisions of article 11 (2)(b) of the Convention were insufficiently precise, thus making them unsuitable for direct application by national courts.

4.4 The State party adds that, in the Netherlands, social insurance has always been aimed at protecting persons in paid employment against the risk of loss of income. Initially, employees were protected only against loss of income resulting from incapacity for work. Subsequently, protection was extended to cover invalidity, sickness, unemployment and old age. Since the 1950s, non-employees have also been protected and national insurance was established. In 1970, the General Invalidity Act entered into force, providing for insurance for both employees and self-employed persons against incapacity for work. In 1998, the authorities amended the legislation governing incapacity for work so as to allow greater individual responsibility and initiative. Public schemes were retained where risks were extremely high and thus impossible to be borne by individuals. The General Invalidity Act was repealed and replaced by a number of acts for employees, young persons with disabilities and self-employed persons. The Incapacity Insurance (Self-employed Persons) Act was one such act, introducing compulsory incapacity insurance for self-employed persons, professionals and spouses working in family businesses.

4.5 Before the adoption of the Incapacity Insurance (Self-employed Persons) Act, no public maternity scheme for self-employed women existed. Under certain conditions self-employed women could choose to take out insurance under the Sickness Benefits Act, which included maternity benefit; a small proportion of self-employed women opted to do so. The Incapacity Insurance (Self-employed Persons) Act put in place a separate insurance scheme, funded by the target group itself, which included maternity benefit for 16 weeks for self-employed women.

4.6 In 2001, the Work and Care Act was adopted in response to the case law of the Court of Justice of the European Union to the effect that pregnancy may not be seen as sickness; the maternity provisions under the Incapacity Insurance (Self-employed Persons) Act lapsed. The Work and Care Act also compiled existing statutory provisions on leave into a single statutory framework. The benefits continued to be funded from contributions of those insured.

4.7 In subsequent years, independent entrepreneurship was deemed to entail acceptance of the associated opportunities and risks. Furthermore, self-employed persons could take out private insurance against incapacity. A State scheme was thus considered no longer necessary. Neighbouring countries also considered that self-employed insurance was not a State responsibility. Self-employed persons

themselves were not satisfied with the Work and Care Act system because of the level of the contributions and the fact that they were based on income. For those reasons, the Discontinuation of Access to Incapacity Insurance (Self-employed Persons) Act was introduced in August 2004, abolishing the public incapacity insurance scheme for self-employed persons and the Work and Care Act maternity scheme for self-employed persons. In 2008, the Work and Care Act was amended, introducing a State maternity scheme to protect the health of mothers and children. Since then, self-employed mothers can claim maternity benefits up to the minimum wage for 16 weeks. Unlike the previous scheme, the benefits are financed by public funds and not by contributions.

4.8 Regarding the merits of the present communication, the State party disagrees with the authors' allegation of a violation of article 11 (2)(b) of the Convention. It believes that the provision has no direct effect. It acknowledges that it is bound by the Convention, but considers that this does not necessarily mean that the specific provisions of the Convention have direct effect. It further notes that neither the text of the Convention nor its drafting history indicates that the provision in question was intended to have direct effect. According to the State party, the question of whether it has direct effect needs to be assessed in the light of national law. The question was raised in the parliament of the Netherlands during debate on the act approving the Convention. The Government then affirmed that article 7 had direct effect, but doubted that the national courts would attribute direct effect to, for example, article 11 (2).

4.9 Under article 93 of the Constitution, provisions of treaties that may be binding on all persons by virtue of their content become binding after their publication in the State party. Such provisions have direct effect in the legal system of the Netherlands without national legislation being required. To decide whether such provisions may be binding on all persons by virtue of their content, it is necessary to verify whether they impose obligations or assign rights and whether they are unconditional and sufficiently clear to be applied by the courts in individual cases.

4.10 The State party considers that article 11 (2)(b) of the Convention is not unconditional and is not sufficiently clear to be applied by national courts in individual cases. The article requires States parties to take "appropriate measures" to prevent discrimination against women on grounds of maternity, i.e. it constitutes a best-efforts obligation and does not lay down clear rules on how to pursue this objective. It does not say what priorities States parties must set and what rights must be given precedence and does not specify what form maternity leave must take or the associated conditions. According to the State party, the provision does not require the establishment of a particular maternity leave scheme, but rather seeks to ensure women's effective right to work, including in the event of pregnancy and maternity. This right is not sufficiently specific as to be applied directly by the national courts. The national courts have upheld this position on three occasions in the present communication. In addition, in two judgements, the Central Appeals Court for Public Service and Social Security Matters has emphasized that this provision is a best-efforts obligation, without direct effect.

4.11 The State party finds the authors' reference to the Committee's views in *Nguyen* irrelevant to the present case, pointing out that there the Committee explained that, under article 11 (2)(b) of the Convention, States parties must ensure maternity leave with pay or comparable social benefits. The Committee also stated,

however, that the provision left States parties free to decide what form the benefit scheme should take. In addition, the Committee indicated that States parties were allowed to take different measures for women in paid employment and for self-employed women.

4.12 The State party adds that its acceptance of the Optional Protocol to the Convention does not mean, as claimed by the authors, that all the provisions of the Convention are so specific that they have direct effect. The issue of whether a State party has taken sufficient measures to implement a provision is different to that of whether the provision has direct effect. If it were otherwise, the Convention would have assigned different obligations to States that are also parties to the Optional Protocol and those that are not. The Optional Protocol provides only a procedure and does not elaborate on the provisions of the Convention.

4.13 According to the State party, the authors' interpretation of article 11 (2)(b) is overly broad when they claim that it applies both to paid employees and self-employed persons. The State party believes that the provision applies only to women in paid employment. The text states that maternity leave must be introduced with pay; "pay" refers to paid employment. The text cannot be interpreted as meaning protection for self-employed persons. Self-employed persons are not in a dependent relationship and enjoy the right to take leave and return to work after pregnancy on the basis of their self-employed status. Such persons can take measures to cover the risk of loss of income themselves by saving or taking out insurance. This is a fundamental difference between self-employed persons and paid employees.

4.14 The State party adds that the authors' broad interpretation of article 11 is not obvious also when compared with other international treaties. The European Social Charter and the International Labour Organization (ILO) conventions contain provisions similar to article 11. The parallel with the ILO conventions is recognized not only by the State party, but also by ILO itself.[9] The ILO conventions on maternity protection focus exclusively on protecting employees with an employment contract and not on protecting self-employed persons.

4.15 On the authors' argument that the authorities should have compensated self-employed women for loss of income resulting from maternity and that the conditions for private maternity insurance were less favourable than those of the earlier, compulsory public insurance scheme, the State party first notes that, even if it had an obligation to make provision for self-employed persons, it is free to decide what form this should take. When taking "appropriate measures", the authorities are free to determine the details of the maternity policy and benefits. They can introduce a public scheme or leave it to the private sector. The drafting history of the Convention also shows that a deliberate decision was made to leave open the manner in which the costs of the measures referred to in article 11 (2)(b) are to be funded.[10] The authorities' involvement is unnecessary if, as in the present case, self-employed persons can obtain adequate private insurance against risk. Furthermore, the State party has facilitated private insurance by making the premiums tax deductible. Some self-employed persons were able to voluntarily

[9] Reference is made, among others, to Lars Adam Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination against Women* (Dorecht, the Netherlands, Martinus Nijhoff Publishers, 1993), pp. 128-130.

[10] Ibid., pp. 139-140.

insure themselves under the Sickness Benefits Act, which provides entitlement to maternity benefit for a period of 16 weeks. In the State party's opinion, an adequate maternity scheme for self-employed women therefore existed.

4.16 The State party adds that the fact that the authors found the conditions offered by private insurers, including the existence of a waiting period, less attractive does not permit a conclusion to be drawn that the authorities have failed to make adequate provision. Insurance companies are in principle free to determine the extent of the risk, the level of benefit and the conditions under which cover is provided. The reason why insurers apply a waiting period in case of pregnancy is that, unlike sickness and incapacity for work, pregnancy does not involve an unforeseeable risk. The Equal Treatment Act guarantees that insurance companies do not make an impermissible distinction on the grounds of sex and maternity.

4.17 The State party concludes that, in the light of the foregoing considerations, no violation of article 11 (2)(b) of the Convention has occurred in the present case.

**Authors' comments on the State party's submission**

5.1 On 24 September 2012, the authors submitted their comments on the State party's observations on the admissibility and the merits. Regarding the issue of direct effect, they argue that the wording of the first sentence of article 11 (2) and article 11 (2)(b) of the Convention clearly imposes a specific duty on the State party to achieve a certain result, which is to give women who perform paid work the right to receive compensation for loss of income during maternity. The authors' understanding of this provision is that States parties must ensure that women who perform paid work are entitled to maternity leave. According to the authors, States parties are not allowed to decide not to create an arrangement for maternity leave for women workers.

5.2 The authors further disagree with the State party's argument regarding the lack of detail in the obligation under the Convention to take "appropriate measures" regarding maternity leave leading to lack of direct effect. The authors note that, while States parties are required to take appropriate measures to introduce maternity leave, this does not mean that States parties have the freedom to take no measures. In their opinion, the first sentence of article 11 (2) and article 11 (2)(b) of the Convention impose a duty on States parties to introduce maternity leave. In the present case, no provision whatsoever was in place for the authors. The provision of the Convention in question is sufficiently detailed and unconditional to be applied in court. In the authors' opinion, even if one could argue as to the extent of the maternity leave to be established, nothing suggests that the State party has no duty to create a provision. The authors contend that the wording of the first sentence of article 11 (2) and article 11 (2)(b) is sufficient and as detailed as possible, given that it would have been impossible for a treaty such as the Convention to describe in detail what maternity leave should look like in all States parties in the light of the diversity of legal systems among States parties.

5.3 The authors further qualify as incorrect the State party's explanation that, under the legal system of the Netherlands, a provision has direct effect only when no national legislation is required. They contend that the legal system recognizes the following three types of provisions in conventions: provisions serving as instructions that cannot be invoked directly in court; sufficiently detailed provisions that can be invoked directly in court, even though their implementation requires

further legislative action; and provisions of such clarity, which can be relied on in court by individuals. The authors add that the Supreme Court of the Netherlands has qualified article 7 of the Convention as a provision of the second type in the Staatkundig Gereformeerde Partij (SGP) case, holding: "that the State party must take further measures that will result in women actually being granted the right to stand for election by SGP and that the State must use instruments that are both effective and affect the fundamental rights of the SGP (members) as little as possible".[11]

5.4 In the authors' opinion, the first sentence of article 11 (2)(b) falls within the same category as article 7 and the Supreme Court should have considered that the provision also has direct effect, given that the goal to be realized is sufficiently clear and that the provision compels the State to take further measures to realize the goal. They do not understand why the approach of the Court is not the same for both articles and why the Court did not elaborate on its reasoning in greater detail.

5.5 The authors note that, when the legislation approving the Convention was created, the Government considered that article 7 would have direct effect. No such remarks were made regarding article 11, however. This, according to the authors, does not mean that a court has no duty to decide that article 11 (2)(b) also has direct effect. In the authors' opinion, in the State party, the courts decide which provisions have direct effect. The courts, according to the authors, should take into account the considerable time elapsed since the adoption of the Convention and the fact that the Convention is a living instrument. Provisions that may previously have been strictly regarded as having no direct effect may be seen differently today.

5.6 The authors consider the State party's reference to the decisions of the Central Appeals Tribunal of January 2000 and April 2003 irrelevant to their case. They do not share the Tribunal's conclusion that the first sentence of article 11 (2) and article 11 (2)(b) have no direct effect. They point out that the case of January 2000 was related to an enrolment in a study programme while on benefits; it was in an only general sense that the Tribunal ruled that article 11 had no direct effect. The other decision, of April 2003, was related to the decision submitted to the Committee in *Nguyen*. In the case, the Committee decided that the first sentence of article 11 (2) and article 11 (2)(b) ordered States parties to introduce maternity leave with retention of salary or other social security benefit; in the authors' view, this means that States are obliged to introduce a maternity leave scheme, even if its shape remains open.

5.7 The authors consider that the Committee's findings in *Nguyen* are relevant to their case. According to them, the Supreme Court should have taken the Committee's views in *Nguyen* into account when deciding whether the first sentence of article 11 (2) and article 11 (2) (b) had direct effect in the context of the present case.

5.8 They refer to the Committee's concluding observations adopted following the examination of the fifth periodic report of the Netherlands, in which the Committee had expressed regret that the question of the direct applicability of the provisions of the Convention continued to be determined by national courts and was therefore subject to divergent opinions and that the State party had argued in court the non-direct applicability of substantive provisions of the Convention. The Committee

[11] Supreme Court, 11 July 2008, LJN BD1850, NJ 2008, 578, juridical consideration 4.6.1.

had reiterated its concern that, as a consequence of the position of the State party, the judiciary was left with the responsibility of determining whether a particular provision was directly applicable and that, consequently, insufficient measures had been taken to address discrimination against women and to incorporate all the substantive provisions of the Convention into national laws.[12] The authors contend that the State party ignores the Committee's concluding observations regarding the direct effect of the first sentence of article 11 (2) and article 11 (2)(b). They emphasize that the interpretation of a supervisory and judiciary body must be part of the assessment and that the courts have wrongly failed to include such interpretation in their case.

5.9 In the light of the Committee's decision in *Nguyen*, the State party is aware that, under the first sentence of article 11 (2) and under article 11 (2)(b), it is obliged to arrange maternity leave for working women. According to the authors, this provision should have direct effect, requiring the authorities to take further measures. The compensation claimed by the authors is based on the statutory system for self-employed women that applied until August 2004 and that was reintroduced in June 2008. This system, in the authors' opinion, may be regarded as the implementation of the State party's obligation under article 11 of the Convention.

5.10 The authors add that the State party cannot ignore its international obligations by invoking national law and note that States parties are liable for their judiciaries. The State party has accepted article 11 of the Convention as a source of binding obligations. The Committee has a supervisory role and has given a wide interpretation of the scope of this article, which is binding on the State party.

5.11 As to the State party's argument that article 11 does not apply to self-employed women because the word "pay" focuses on salaried women,[13] the authors argue that the first sentence of article 11 (2) and article 11 (2) (b) refer not only to retention of salary with "pay", but also to "pay or comparable social benefits". According to them, the State party's argument is incorrect. The meaning of "pay" is wider than salaried employment. They note that, in *Nguyen*, the history of the development of the Convention was reflected and the Committee concluded that the first sentence of article 11 (2) and article 11 (2)(b) applied to self-employed women. In addition, the State party has not addressed the authors' arguments thereon in their initial submission.

5.12 Regarding the State party's argument that self-employed women should make the necessary arrangements for maternity leave, they reiterate that they had no option to arrange maternity leave, given that, after the abolishment of the statutory arrangement in 2004, most private insurance policies had a two-year exclusion period. In addition, the authors could not afford the cost of private insurance as a result of their relatively low income; the State party did not refute this, even though it observed that the premium payments were tax deductible. Accordingly, self-employed women particularly needed an arrangement for maternity leave; the State party was aware of this when reintroducing the maternity leave scheme for self-employed workers in 2008.

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[12] CEDAW/C/NLD/CO/5, para. 12.

[13] The authors note the State party's argument that the ILO conventions do not apply to self-employed women, but claim that they will not address it because ILO treaties are not being discussed in the present proceedings.

5.13 As to the State party's argument that it has complied with its obligations under article 11 because the authors could have taken out private insurance, the authors note that they complained in court that the two-year exclusion period imposed by the insurers was discriminatory against women, but the courts disagreed. Thus, according to the authors, the law on gender equality was ineffective.

5.14 The authors add that voluntarily taking out private insurance against sickness is open only to women who have worked as employees and become self-employed thereafter.

5.15 In conclusion, the authors indicate that, when reintroducing the maternity leave scheme in 2008, the State party could have been expected to offer adequate compensation to self-employed women who had given birth between 1 August 2004 and 4 June 2008.

5.16 Lastly, the authors qualify as incorrect the State party's reference to the situation in neighbouring countries. In substantiation, they refer to a recommendation by the Equal Treatment Commission to the Government of the State party in 2007 based on a comparative study, to the effect that the Netherlands was the only State of the then 29 States members of the European Economic Area where no maternity leave scheme for self-employed women was financed by public funds.

**State party's additional observations**

6.1 On 10 April 2013, the State party challenged the authors' contention that it had claimed that the provisions of the Convention had direct effect only if they did not require further implementation. It refers to its previous submissions and explains that a treaty provision must be examined in order to determine whether it has direct effect, i.e. to assess whether the provision grants rights to or imposes obligations on citizens and whether it is unconditional and sufficiently precise to be applied by the courts in individual cases.

6.2 As to the authors' reference to the case law of the Supreme Court of the Netherlands whereby the Court accepted the direct effect of article 7 of the Convention (see para. 5.3), the State party confirms that, in the SGP case, the Court held that "the State must take further measures that will result in women actually being granted the right to stand for election by SGP and that the State must use instruments that are both effective and affect the fundamental rights of the SGP (members) as little as possible". The State party, however, disputes any suggestion that the Court had meant statutory measures in this respect, stating that it is evident from the judgement in question that the quoted passage relates to taking enforcement measures against SGP and not statutory measures.

6.3 As to the authors' suggestion that the 2008 self-employment and pregnancy scheme was introduced to implement the obligation under article 11 (2)(b) of the Convention, the State party reiterates its argument that there is no obligation to establish such a scheme under this provision; rather, the scheme was introduced to protect the health of mothers and children.

6.4 Regarding the authors' contention that, in *Nguyen*, the Committee emphasized that article 11 (2)(b) of the Convention applied to self-employed women, the State party notes that the case in question concerned the accumulation of rights under the schemes for women with salaried employment on the one hand and the scheme regarding self-employed women on the other, as existing at the time. In *Nguyen*, the

Committee decided that the State party might operate different schemes for salaried and self-employed women, but did not explicitly rule that article 11 (2)(b) applied to self-employed women.

6.5 Lastly, the State party qualifies as incorrect the authors' contention that the Government has stated that a maternity scheme for self-employed women is not regarded as a State responsibility in neighbouring countries either. In its previous submissions, the State party has observed that incapacity insurance for the self-employed is not regarded as a State responsibility in neighbouring countries; that was one of the reasons for terminating the Incapacity Insurance (Self-employed Persons) Act system.

**Issues and proceedings before the Committee**

*Consideration of admissibility*

7.1 In accordance with rule 64 of its rules of procedure, the Committee must decide whether the communication is admissible under the Optional Protocol. Pursuant to rule 72 (4), it must do so before considering the merits of the communication.

7.2 In accordance with article 4 (2)(a) of the Optional Protocol, he Committee is satisfied that the same matter has not already been and is not being examined under another procedure of international investigation or settlement.

7.3 The Committee further notes that the State party has not challenged the admissibility of the communication and that it has no reason to find the communication inadmissible on any ground. Accordingly, it declares it admissible.

*Consideration of the merits*

8.1 The Committee has considered the present communication in the light of the information made available to it by the authors and by the State party, as provided in article 7(1) of the Optional Protocol.

8.2 The Committee has noted the authors' claim that, because they received no maternity leave benefits as a result of the reform of the system in 2004, they are entitled to compensation equal to the benefits that they would have received under the Incapacity Insurance (Self-employed Persons) Act before the reform. It has also noted the State party's argument that article 11 (2)(b) applies only to women in paid employment and cannot be interpreted as meaning protection for self-employed persons; that self-employed persons can cover the risk of loss of income themselves by saving or taking out private insurance; that no intervention by the State party is necessary because self-employed persons can take out adequate private insurance against that risk; that an adequate maternity scheme existed, given that some self-employed women were able to voluntarily insure themselves under the Sickness Benefits Act, which provides entitlement to maternity benefit for a period of 16 weeks; and that, furthermore, the State party had even facilitated recourse to private insurance by self-employed persons by making such insurance premiums tax deductible.

8.3 The issue before the Committee, therefore, is whether, by removing the existing maternity leave scheme applicable also to self-employed women up to 2004, the State party violated the authors' rights under article 11 (2)(b) of the

Convention, given that they were left, de facto, with no maternity leave benefits after giving birth in 2005 and 2006.

8.4 Concerning the State party's argument that article 11 (2)(b) of the Convention does not apply to self-employed women, the Committee notes that nothing in the wording of article 11, generally, or article 11 (2)(b), specifically, supports such a narrow interpretation. On the contrary, it observes that, during its constructive dialogue with the State party's representatives when examining periodic reports, in its concluding observations and in its jurisprudence, the Committee has systematically dealt with self-employed persons with reference to a number of subparagraphs of article 11 and to article 11 (2)(b) in particular. In addition, the Committee recalls that, in *Nguyen*, to which both the authors and the State party refer, it based its conclusion on the clear assumption that, in the context of article 11 (2)(b), the notion of "all employed women" covered not only women in an employment relationship, but also those self-employed. Thus, in the Committee's view, article 11 (2)(b) is applicable also to self-employed women and not to female employees exclusively.

8.5 The Committee further takes note of the judgement of the District Court of The Hague of 25 July 2007, in which the Court concluded that article 11 (2)(b) of the Convention was not directly applicable because it contained a mere "instruction" for States parties to introduce maternity leave, leaving States parties the freedom to determine how specifically to achieve that in practice. It also notes the State party's contention that the obligation to take "appropriate measures" to prevent discrimination against women on grounds of maternity constitutes a "best-efforts obligation" only. The Committee recalls that, in its concluding observations in the context of the State party's fourth periodic report,[14] it held the view that that provision of the Convention was directly applicable. It reiterated its deep concern about the status of the Convention in the legal system of the State party and in particular about the fact that the authorities continued to consider that not all the substantive provisions of the Convention were directly applicable.

8.6 The Committee notes that, in this context, the State party was called upon to reconsider its position that not all the substantive provisions of the Convention were directly applicable within the domestic legal order and, in particular, to ensure that all the provisions of the Convention were fully applicable. It further recalls that, by ratifying the Convention and the Optional Protocol thereto, the State party committed itself to providing remedies to individuals who were victims of violations of their rights under the Convention. It also recalls its concern at the repealing of the Invalidity Insurance (Self-employed Persons) Act in 2004 by the authorities, resulting in the termination of maternity allowance for self-employed women; the Committee had specifically called upon the State party to reinstate maternity benefits for all women, to include self-employed persons, in line with article 11 (2)(b) of the Convention.[15] The Committee furthermore refers to its general recommendation No. 28, which provides that the question of the direct applicability of the Convention at the national level is a question of constitutional law and depends on the status of treaties in the domestic legal order. Under the Convention, the State party has thus an obligation to give effect to the provisions of

[14] CEDAW/C/NLD/CO/4, paras. 11 and 12.

[15] Ibid., paras. 29 and 30.

the Convention (art. 18 of the Convention) or to fulfil or ensure the application of the provisions of the Convention, meaning that the State party cannot invoke a lack of direct applicability or qualifications such as "instructions" or "best-efforts obligations" in order not to fulfil its obligations under article 11 (2)(b).

8.7 The Committee further notes that, notwithstanding the existence of a certain margin of appreciation of States parties in respect of the application in practice of their obligations under article 11 (2)(b) of the Convention, in the circumstances of the present case, after having initially introduced a compulsory public maternity leave scheme applicable to all, including self-employed women even if the latter were financed through a specific allotment, in 2004, the State party abolished the system in question without introducing any transitory measures and decided that self-employed women would no longer be covered by the public insurance scheme but could take out private insurance against loss of income during maternity instead. As a result, the authors were left with no maternity leave insurance on 1 August 2004. The authors sought to take out such insurance privately but, and this remains unrefuted by the State party, all but one were dissuaded from doing so by the costs of the insurance in light of their relatively low income. In addition, and this also remains unchallenged by the State party, private insurers applied a two-year exclusion period for new subscribers during which no maternity benefits for loss of income could be paid in case of maternity leave.

8.8 The Committee notes that the State party has not challenged the authors' allegations, but has merely explained that it was within the margin of appreciation of the national authorities to decide on the exact manner in which a maternity leave scheme was to be applied; that the payments for such insurance were tax deductible; and that, in any event, private insurers were free to determine the exact financial parameters regarding risk coverage. In the circumstances, the Committee considers that the reform introduced in 2004 by the State party did negatively affect the authors' maternity leave benefits, as protected under article 11 (2)(b), if compared with those existing under the previous public coverage scheme.

8.9 The Committee notes that, in the circumstances, the authors received no benefits for loss of income after having given birth in 2005 and 2006, with the exception of Ms. De Blok (who had taken out private insurance and received a one-time lump sum payment from her insurer, but only after notifying the insurance company that she intended to pursue the matter in court). Thus, the State party's failure to provide maternity benefits affected pregnant women adversely and therefore constitutes direct sex and gender-based discrimination against women and a violation of the obligation of the State party to take all appropriate measures to eliminate discrimination under article 11 of the Convention. Accordingly, the Committee considers that, by abolishing the initially existing public maternity leave scheme without putting in place an adequate alternative maternity leave scheme to cover loss of income during maternity leave immediately available to the self-employed authors when they gave birth, the State party failed in its duties under article 11 (2)(b) of the Convention.

9. Acting under article 7 (3) of the Optional Protocol to the Convention, and in the light of the above considerations, the Committee is of the view that the State party has failed to fulfil its obligations and has thereby violated the rights of the authors under article 11 (2)(b) of the Convention. The Committee makes the following recommendations to the State party:

(a) Concerning the authors of the communication:

To provide reparation, including appropriate monetary compensation, for the loss of maternity benefits;

(b) General:

The Committee notes that the State party has amended its legislation in June 2008 (with the entry into force of the Work and Care Act) and has ensured that a maternity leave scheme is available also to self-employed women, thus not permitting similar violations to reoccur in the future. It notes, however, that no compensation is possible for self-employed women, such as the authors, who gave birth between 1 August 2004 and 4 June 2008. The State party is accordingly invited to address and redress the situation of such women.

10. In accordance with article 7 (4) of the Optional Protocol, the State party shall give due consideration to the views of the Committee, together with its recommendations, and shall submit to the Committee, within six months, a written response, including any information on any action taken thereon. The State party is also requested to publish the Committee's views and recommendations and to have them widely disseminated in order to reach all relevant sectors of society.

[Adopted in Arabic, Chinese, English, French, Russian and Spanish, the English text being the original version.]